appear the same in effect as that in the first class of cases. A third situation is where the parties marry, both knowing of an existing disability, or simply live together meretriciously. In such cases since matrimonial intent cannot be inferred from past conduct, the courts, before finding a valid marriage, properly require affirmative proof of mutual consent to marriage after the disability is removed.[16] A fourth class of cases is where only one party knew of the disability when the pair were first married. Some courts hold that the mere continuing of cohabitation after the disability is removed is insufficient evidence of the requisite agreement.[17] Other courts say the fraudulent party is estopped to show his lack of consent because of his wrong, and so find a subsequent agreement.[18] On the analogy of ordinary contract principles, it may be argued that there is a valid agreement as soon as the disability is removed, since there is apparent mutual consent which is ordinarily sufficient.[19]

In the light of the above discussion an interesting case recently decided in Illinois would seem incorrect. *People* v. *Shaw*, 102 N. E. 1031 (Ill.). The defendant married a woman in New York, neither knowing of a disability.[20] They moved to Illinois, where there was no disability, and continued to live as man and wife. The defendant then deserted this woman and married another, and was held not guilty of bigamy. As the evidence showed that neither party doubted the validity of the original ceremony in New York, there was real consent by both to be married when the parties lived in Illinois thinking themselves man and wife. It is submitted, therefore, that a common-law marriage was there contracted, and that the defendant was guilty of bigamy.[21]

COMPULSORY INTERCHANGE OF TRANSFERS BETWEEN INDEPENDENT STREET RAILWAY COMPANIES. — Having laid down the proposition that the legislature may enact regulations governing public service corporations,[1] the courts have but slowly blocked out the limitations of this power.[2] It is settled that the regulation must not be unreasonable.[3] But this term will throw little light on the subject until its meaning has been

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[16] There should clearly be no presumption that their meretricious intent was changed based merely on their continued cohabitation. Harbeck *v.* Harbeck, 102 N. Y. 714, 7 N. E. 408.

[17] Collins *v.* Voorhees, 47 N. J. Eq. 555, 22 Atl. 1054; Hunt's Appeal, 86 Pa. St. 294.

[18] Matter of Wells, 123 App. Div. 79.

[19] Robinson *v.* Ruprecht, 191 Ill. 424, 61 N. E. 631; *cf.* Tarrt *v.* Negus, *supra*. It would seem, however, that policy is against the state imposing the marriage status without actual consent of the parties.

[20] The disability was caused by the fact that the woman had a husband living and her divorce from him in California was not recognized in New York. O'Dea *v.* O'Dea, 101 N. Y. 23, 4 N. E. 110. The California divorce was valid in Illinois, however. Knowlton *v.* Knowlton, 155 Ill. 158, 39 N. E. 595. This is one of the peculiar situations made possible by the decision of Haddock *v.* Haddock, 201 U. S. 562, 26 Sup. Ct. Rep. 525.

[21] State *v.* Thompson, 76 N. J. L. 197, 68 Atl. 1068.

[1] Munn *v.* Illinois, 94 U. S. 113.

[2] 2 WYMAN, PUBLIC SERVICE CORPORATIONS, § 1402 *et seq.*

[3] Railroad Commission Cases, 116 U. S. 307, 331, 6 Sup. Ct. 334.

more clearly defined. So far as the regulation has to do with rates, it is well settled that it is unreasonable if it is confiscatory, that is, if upon the entire business the regulation does not permit a return equal to the cost of operation and a fair profit.[4] Further, while it is unreasonable regulation not to leave the corporation a fair return on each general division of the service,[5] it has been held that the regulation is valid though it will result in the carriage of a particular class of articles or persons at a loss.[6]

Confiscation of the property of the company, however, cannot be the only limitation of regulation.[7] A recent case in the Court of Appeal for the District of Columbia held that an act of Congress requiring an interchange of transfers between two street railways independently owned and operated was constitutional. *District of Columbia* v. *Capital City Traction Co.*, 41 Wash. L. Rep. 766. Had this act established a through rate of five cents with a provision that each street railway should receive two and a half cents upon every through journey, it is believed that it could with propriety have been held constitutional on the ground that the legislature may establish reasonable through rates.[8] The public necessity is very considerable, and if the distances are not so great as to demand a zone system, two carriers are really doing the work that one ought to do,[9] and a single fare is all that the service is reasonably worth. Moreover, under the general system adopted by street railways of fixing a flat rate for all transportation, long or short, no objection can be founded on the ground that one type of service will not yield a profit.[10]

A regulation, however, which compels a carrier to perform its service free, or fails to insure the company against loss, must be unconstitutional.[11] It has been held, though no confiscation was shown, that a regulation was unreasonable which failed properly to safeguard the return of property to the carrier, or which failed to insure compensation for

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[4] Smyth *v.* Ames, 169 U. S. 466, 18 Sup. Ct. 418.

[5] Thus the legislature cannot fix unprofitable rates on the passenger business of a railroad on the theory that the profits on the freight business will be large enough to give a fair return on the whole enterprise. Pennsylvania R. Co. *v.* Philadelphia County, 220 Pa. St. 100, 116, 68 Atl. 676; Philadelphia & Reading R. Co. *v.* County of Phila., 228 Pa. St. 505, 77 Atl. 892. So also the state legislature must leave a carrier a fair return on its intrastate business regardless of its profits on its interstate business. This, however, may be supported on a different line of reasoning. Smyth *v.* Ames, *supra*.

[6] A company may be required to operate a particular train to make a connection though it can only be operated at a loss. Atlantic Coast Line R. Co. *v.* North Carolina Corp. Comm., 206 U. S. 1, 27 Sup. Ct. 585, discussed in 21 HARV. L. REV. 49. See also Atchison, Topeka & Santa Fe Ry. Co. *v.* United States, U. S. Commerce Court Dec., Case No. 61. While it is undoubtedly law to-day that a carrier cannot complain that it is confiscatory to make it carry a class of commodities at a rate that is less than the fair proportional cost of the service and a fair proportion of its profits, may not a logical extension of the proposition that each division must pay its share cause such a regulation eventually to be declared unreasonable?

[7] Lake Shore & Mich. So. R. Co. *v.* Smith, 173 U. S. 684, 19 Sup. Ct. 565.

[8] See 22 HARV. L. REV. 564.

[9] People *ex rel.* Cohoes Ry. Co. *v.* Pub. Serv. Comm., 143 N. Y. App. Div. 769, 128 N. Y. Supp. 384, aff'd 95 N. E. 1137.

[10] Note 6, *supra*.

[11] Railroad Commission Cases, *supra*, 331; Wilson *v.* United States Traction Co., 72 N. Y. App. Div. 233, 76 N. Y. Supp. 203. *Contra*, State *v.* Sutton, 84 Atl. 1057 (N. J.). See 26 HARV. L. REV. 360.

its use.[12] And so also it is unreasonable regulation to compel a carrier to extend credit to another carrier by a system of interchangeable mileage.[13] In the principal case no provisions were made for apportioning the charge collected for the through service or for adjusting the differences in the number of transfers accepted by the two companies. It cannot be assumed that precisely the same number of passengers will be carried on transfer by each company.[14] Therefore the company carrying the larger number will be required to carry some passengers free. Moreover, each company is subjected to the danger that the difference will be large.[15] It is submitted that this is unreasonable regulation.[16] In conclusion it must be borne in mind that to regulate is to control, not change the undertaking. The undertaking of a public service company is to exchange service for money. Such a statute as this essentially changes the undertaking, and therefore it is in no true sense a regulation. It cannot be urged, therefore, in defense of the statute, that the corporation still makes a fair profit.

RECENT CASES.

BURDEN OF PROOF — PROOF OF MAIN ISSUE QUANTUM OF PROOF UNDER PENAL STATUTES. — A statute provided for the punishment of the importation of contract laborers by means of a civil action for a penalty, at the suit of the United States or an informer. *Held*, that a violation need only be established by a preponderance of evidence. *United States* v. *Regan*, Supreme Court, Jan. 5, 1914.

The court reverses a decision in the Circuit Court which required proof beyond reasonable doubt on the ground that the act forbidden was called a misdemeanor by the statute. The decision of the lower court was discussed and disapproved in 27 HARV. L. REV. 77.

BURGLARY — BREAKING — OPENING A DOOR ALREADY AJAR. — The defendant found the door of a freight car partly open, and opened it further to effect an entry for the purpose of larceny. By statute the common-law definition of burglary includes breaking into railroad-cars. Vt. Statute, 1909, § 5751. *Held*, that there was a sufficient breaking to satisfy an information for burglary. *State* v. *Lapoint*, 88 Atl. 523 (Vt.).

The older cases uniformly held that raising a window or pushing a door, already partly open, was not such a breaking as to make the entry a burglarious one. *Rex* v. *Smith*, 1 Moody C. C. 178; *Rose* v. *Commonwealth*, 19 Ky. L. Rep. 272, 40 S. W. 245; *Commonwealth* v. *Strupney*, 105 Mass. 588; *State* v. *Wilson*, 1 N. J. L. 502. Blackstone supports this, reasoning that the negligence of the

[12] Louisville & Nashville R. Co. *v.* Central Stock Yards Co., 212 U. S. 132, 29 Sup. Ct. 246.

[13] Attorney General *v.* Old Colony R. Co., 160 Mass. 62, 35 N. E. 252.

[14] For all that appears, an even balancing of debits and credits might have existed between the railroads in question in either the case in note 12, where the legislature attempted to compel a reciprocal lending of cars, or that in note 13, where the regulation provided for the interchangeability of mileage.

[15] In the principal case three companies were under the act. A case may be supposed where one company operating between the other two would get practically all transfers and no fares.

[16] Chicago City R. Co. *v.* City of Chicago, 142 Fed. 844. An oral decision *contra* to the principal case but citing no authorities.